

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Petition of St. Luke's Center for Diagnostic
Imaging, LLC For Waiver of Section
64.1200(a)(4)(iv) of the Commission's Rules

CG Docket No. 05-338

**PETITION OF ST. LUKE'S CENTER FOR DIAGNOSTIC IMAGING, LLC
FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,¹ St. Luke's Center for Diagnostic Imaging, LLC ("St. Luke's") respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by St. Luke's (or on its behalf) with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. For the reasons stated, a waiver is appropriate here.

I. INTRODUCTION.

St. Luke's is in the business of managing and delivering high-quality medical imaging and related services to medical patients. St. Luke's conducts its business by coordinating with healthcare providers who refer patients to St. Luke's facilities to be imaged and receive related services. Because St. Luke's business is almost entirely referral-based, St. Luke's has an extensive network of account executives who engage in in-person, door-to-door marketing efforts with referring physicians and other sources of potential imaging patients. St. Luke's network of referring physicians refer patients to St. Luke's by telephoning or faxing information to St. Luke's, and requesting that St. Luke's perform certain services for the

¹ 47 C.F.R. § 1.3.

referring physician to aid in patient diagnosis and treatment. St. Luke's performs the requested services, manages the insurance billing, and typically sends the results of the services back to the referring physician via facsimile. The account executives and center staff typically confirm that the referring physicians agree to receive future communications regarding St. Luke's via in-person visits, mail and/or facsimile. St. Luke's sends facsimiles to referring physicians, who have provided their prior express consent to receive such facsimiles, in an effort to advise referring physicians of the services they offer, new products, or other new developments at St. Luke's locations.

St. Luke's currently is facing a putative class action lawsuit seeking potentially multi-millions of dollars in damages because it allegedly sent faxes to its referring physicians who had consented to receive them. The basis for certain claims in the lawsuit is the Telephone Consumer Protection Act ("TCPA").

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order").² Prior to the Fax Order's release, various petitioners had challenged the Commission's authority to issue the Regulation and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order apply to the identified petitioners, and the Commission made clear that other, similarly-situated entities, like St. Luke's, may also seek such waivers.

² See *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014).

Specifically, there is no public interest in strict enforcement of the Regulation against businesses who were confused by the Regulation and therefore did not include appropriate opt-out notices to fax recipients who had provided “prior express invitation or permission” to be sent faxes. In contrast, the public interest would be harmed by requiring parties, like St. Luke’s, to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and possibly ruinous) litigation because of past confusion over the Commission’s regulations. A waiver is thus appropriate here.

II. BACKGROUND.

A. The Current Statutory and Regulatory Framework.

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 (“JFPA”),³ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁴ An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁵

As relevant to this Petition, the Regulation states a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”⁶ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.⁷ As explained in the Fax Order, a footnote in the Junk Fax Order led to industry-wide

³ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

⁴ 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

⁵ *Id.* § 227(a)(5).

⁶ See 47 C.F.R. § 64.1200(a)(4)(iv); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd at 3812, para. 48 (2006) (the “Junk Fax Order”).

⁷ See *generally* Junk Fax Order.

confusion regarding the Commission's intent to apply the opt-out notice to Solicited Faxes.⁸ The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission "confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders."⁹ Due to the aforementioned confusion,¹⁰ however, the Commission decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like St. Luke's, who have sent fax ads with the recipient's prior express permission and may reasonably have been uncertain about opt-out notice requirements for such fax ads. As explained by the Commission:

[W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

* * *

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

⁸ See Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 ("We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.") (emphasis added).

⁹ See Fax Order, para. 1.

¹⁰ The Commission detailed the reasons for such uncertainty in the Fax Order: "Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, the footnote stated that 'the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.' The use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." See Fax Order, para. 24-25 (internal footnotes omitted).

The Commission stated that other affected parties similarly situated as the petitioners, like St. Luke's, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.¹¹ St. Luke's Petition is thus timely.

B. St. Luke's Was Sued For Allegedly Violating the TCPA.

St. Luke's was sued based on alleged violations of the TCPA's fax provisions. The pending class action lawsuit, *Alan Presswood, D.C., P.C. v. St. Luke's Center for Diagnostic Imaging, LLC*, Cause No. 14SL-2201420 (Circuit Court, County of St. Louis, Missouri). This case was filed by serial TCPA litigator Brian Wanca of Anderson + Wanca, whose law firm has filed dozens (if not hundreds) of junk fax lawsuits throughout the country. Although the faxes at issue in the *Presswood* case were solicited and/or sent with prior express invitation or permission, plaintiff argues St. Luke's failed to provide an appropriate opt-out notice.¹²

III. DISCUSSION.

A. The Commission Should Grant a Limited Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Fax Sent by St. Luke's or on its Behalf.

St. Luke's respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Faxes sent by St. Luke's (or on its behalf) after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.¹³ Generally, the Commission may grant a waiver of its rules in a

¹¹ See Fax Order, para. 30.

¹² The parties to the *Presswood* case also dispute, *inter alia*, whether the faxes were solicited. However, it is not necessary for the Commission to consider that dispute in acting on this Petition, and the dispute does not impact the sole issue raised in this Petition. Indeed, the Commission expressly noted that granting waiver should not "be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." See Fax Order, para. 31. The two issues—whether waiver should be granted and whether waiver applies to any particular fax—are distinct.

¹³ 47 C.F.R. § 1.3; see also 47 C.F.R. § 1.925(b)(3)(i)-(ii).

particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest.¹⁴

Further, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.¹⁵ As shown, both rationales apply.

B. Waiver Would Not Undermine the TCPA's Policy Objective.

Granting waiver to St. Luke's would not undermine the policy objective of the TCPA, which is "to allow consumers to stop unwanted faxes."¹⁶

This policy is not undermined where, as here, the faxes were *wanted*. The plaintiff—a St. Luke's referring physician—had given St. Luke's express permission to send it fax advertisements. Notably, the fax recipient was in repeated communication with its assigned St. Luke's account executives over several years, yet, to St. Luke's knowledge, the fax recipient never asked St. Luke's to refrain from sending it faxes.

More broadly, unlike indiscriminate "fax blasters" to the general consumer public, St. Luke's does not send faxes to consumers but rather only to a limited select group of recipients: referring physicians. Without question, St. Luke's has every incentive not to send unwanted faxes to its referring physician network, lest it offend its referral sources. Accordingly, in St. Luke's situation, where its fax recipients *wanted* faxes, a waiver manifestly would not undermine a policy objective to stop *unwanted* faxes.

C. Special Circumstances Suggest Deviation is Appropriate.

As the Commission has explained, special circumstances counsel in favor of deviation from the general rule—rather than strict adherence. As detailed in the Fax Order, there was

¹⁴ See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁵ See *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁶ Junk Fax Order, para. 48.

industry-wide confusion as to whether Solicited Faxes must include an opt-out notice based, in part, on the special circumstance of a confusing footnote in the Junk Fax Order. St. Luke's, like many other companies, was reasonably confused as to whether Solicited Faxes must include an opt-out notice. Moreover, in St. Luke's situation, waiver strongly is in the public interest because denial of waiver could subject St. Luke's to potentially crushing money damages—the bulk of which would go to plaintiffs' lawyers—rather than further the TCPA's policy objective. Surely Congress did not intend to devastate productive commercial enterprises by transferring the fruits of productivity to serial TCPA plaintiffs' lawyers. Indeed, the Commission made clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently (and allegedly) acted outside of it, like St. Luke's, to potentially ruinous damages:

The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.¹⁷

In sum, St. Luke's sent faxes to its referring physicians with prior express permission and/or consent and was reasonably uncertain about whether opt-out notices were required on such fax ads. Therefore, St. Luke's is similarly situated vis-à-vis the petitioners identified in the Fax Order and equally entitled to a limited retroactive waiver. Such waiver would not undermine the TCPA policy objective to prevent unwanted faxes because the faxes sent by St.

¹⁷ Fax Order, para. 27.

Luke's were wanted by the recipients. Finally, St. Luke's submits that the public interest would be better served by the FCC's granting waiver rather than exposing St. Luke's to potential catastrophic money damages that would serve mainly to enrich plaintiffs' lawyers.

IV. CONCLUSION.

For the reasons stated above, St. Luke's respectfully requests that the Commission grant St. Luke's a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by St. Luke's (or on its behalf) after the effective date of the Regulation.

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